87-212

Supreme Court, U.S.
FILED
JUL 30 1987
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No.....

AMATEYUS LTD., d/b/a VOLK & HUXLEY,
AND VULCAN TYPOGRAPHY CO.

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KEVIN P. QUILL
Chase Manhattan Bank Building
29-27 41st Avenue
Long island City, New York 11101

Attorneys for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 87

AMATEYUS, LTD., d/b/a VOLK & HUXLEY
and VULCAN TYPOGRAPHY CO.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Second Circuit.

KEVIN P. QUILL
29-27 41st Avenue
Long Island City, New York
11101
(718) 786-5299
Attorney for Petitioners

QUESTIONS PRESENTED

1. Whether under Sections 8(a)(5) of the National Labor Relations Act, 29 U.S.C. Sec. 158(a)(5), a successor employer can maintain working conditions while negotiating with the union when the successor is retaining all the employees of its predecessor without adopting the contract.

2. Does a family member, who is a principal of a corporation, by assisting another family member in initially setting up a business, thereby establish an alter ego relationship under the National Labor Relations Act.

PARTIES TO THE PROCEEDING

The Petitioners are separate and independently owned corporations existing under the laws of New York State, which are not affiliated with any other corporate ownership.

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REFERENCE TO THE REPORTS OF OPINIONS BELOW

The Opinion of the Court of Appeals (App., infra, 1a) is reported at 817 F.2d 996. The order of the National Labor Relations Board (App., infra, 1d) is reported at 280 N.L.R.B. No. 21.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals (App., infra, 1c) was entered on May 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 8(a)(1)(3)(5) of The National Labor Relations Act, 29 U.S.C. 158(a)(1), (3), (5) provide in pertinent part:

Sec. 8.(a) It shall be an unfair labor practice for an employer -

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees . . .

Section 7 of the National Labor Relations Act, 29 U.S.C. Sec. 157:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities, for the purpose of collective bargaining or other mutual aid or protection . . .

STATEMENT OF THE CASE

Amateyus, Ltd. is a New York corporation, solely owned by John Cory, which purchased the assets of Volk & Huxley, Inc. from its parent company Imperial Ad Service Inc. Volk & Huxley, Inc., through its membership in the Printers' League Section of the Printing Industries of Metropolitan New York Inc. was bound by the collective bargaining agreement between the League and the Union.

Amateyus, operating under the acquired trade name of Volk & Huxley, commenced operations in June 1981 using the same premises, equipment and employees of Volk & Huxley, Inc. Amateyus was a successor employer bound to recognize and negotiate with

Local 6. Amateyus negotiated with Local 6 concerning changes it wanted from the League contract while maintaining the pay scales, hours and holidays as well as making deductions for the union dues and vacations which were forwarded to the union fund. Local 6 refused to agree to any changes in the League contract for Amateyus and an impasse resulted. Amateyus never signed a contract with Local 6.

Vulcan Typography Co. is a New York corporation which was incorporated and solely owned by Mark Cory, the younger brother of John Cory, in February, 1982. Mark Cory had never been an officer or stockholder in Amateyus. Vulcan opened a similar operation in the same building on

a different floor. Mark Cory had worked at Amateyus and hired the night foreman to be his general manager. Vulcan hired 5 of its 20 employees from Amateyus. Vulcan used mostly new equipment to begin its operation which was financed. Vulcan did pick up some of Amateyus; clientele.

Amateyus began to subcontract out work and did lay off employees, ceasing to operate in March, 1982. Although John Cory did assist his brother initially for approximately 6 weeks, in setting up Vulcan, John Cory never was an officer or stockholder. John Cory was not involved in the labor relations of Vulcan. Vulcan operated as a non-union shop with different wages and benefits than

in the Local 6 contract.

Local 6 filed unfair labor practice charges against Amateyus alleging Sec. 8(a)(1), (3) and (5) violations. The Administrative Law Judge found that Amateyus adopted the contract with Local 6 and that Vulcan is the alter ego of Amateyus and thus bound to the union contract. The Second Circuit held that the record was sufficient to support the findings of Sec. 8(a)(1), (3) and (5) violations.

REASONS FOR GRANTING THE WRIT

1. The record did not support the finding that Amateyus adopted the union contract. Amateyus in purchasing the assets of Volk & Huxley, Inc. became a successor employer under NLRB v. Burns International Security

Services Inc., 406 U.S. 272 (1972). As Amateyus was keeping all of the employees, under the Burns case Amateyus must consult with the union before fixing the initial terms of employment. As it was "perfectly clear" the employees were being retained it would be a violation of the Act if Amateyus failed to consult with the union. EG&G Florida, 279 N.L.R.B. No. 65 (1986); Sorrento Hotel, 266 N.L.R.B. No. 67 (1983); Friederick Truck Service Inc., 259 N.L.R.B. 1294 (1982); Turnbull Enterprises Inc., 259 N.L.R.B. 934 (1982); Mid-States Construction Inc., 270 N.L.R.B. 115 (1984).

The holding in the present case is in conflict with the decisions in

the above cases. There is an important federal question which must be resolved as to the obligation of a successor employer in dealing with a union when the successor employer is retaining all the employees. Under the decision in this case the successor employer is uncertain as to whether to keep the pre-existing employment conditions in effect pending the discussions with the incumbent union and thereby "adopting" the existing contract or change the employment terms without discussing the changes with the union and violating the Act. The exposure of a successor employer to this Hobson's choice creates uncertainty which must be resolved. Amateyus did negotiate with Local

6 and arrived at an impasse and by keeping the same employment terms during the negotiations is found to have adopted the contract.

2. The record does not support the finding of Vulcan being the alter ego of Amateyus. The facts objectively show there was no common ownership nor common officers in Vulcan and Amateyus. Vulcan purchased or financed substantially new equipment in opening. Vulcan only obtained a limited number of the clientele of Amateyus on the closing of Amateyus. The number of employees Vulcan hired who had been employed at Amateyus was less than substantial in the total employment at Vulcan. The finding of alter ego in this case was based on the sibling

relationship of John Cory and Mark Cory. The holding is at variance with other Board cases which have held that mere blood relationships between principals in different corporations do not establish alter ego relationships when assistance is extended between the principals. Shellmaker Inc., 265 N.L.R.B. 749 (1982); Friederich Truck Service Inc., supra; Victor Valley Heating, 267 N.L.R.B. 1292 (1983).

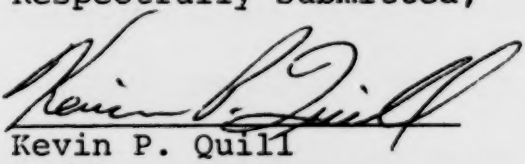
There is an important federal question which must be resolved due to the conflicts in the above cases.

CONCLUSION

The petition for the Writ of Certiorari should be granted.

Dated: July 30, 1987

Respectfully submitted,



Kevin P. Quill
29-27 41st Avenue
Long Island City, N.Y.
11101
(718) 786-5299
Attorney for Petitioners

Appendix A-1

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 848 -- August Term, 1986

Argued March 2, 1987

Decided May 1, 1987

Docket No. 86-4149

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

AMATEYUS, LTD., d/b/a VOLK & HUXLEY

and VULCAN TYPOGRAPHY CO.,

Respondents.

Before OAKES and WINTER, Circuit Judges, and ZAMPANO, District Judge.*

Petition for enforcement of an order of the National Labor Relations Board, 280 N.L.R.B. No. 21 (May 30, 1986), finding that successor employer had adopted its predecessor's collective bargaining agreement and then violated Sec. 8(a)(1), (3), (5) of the National Labor Relations Act by transferring operations to a nonunion alter ego company.

Order enforced.

---

* Of the District of Connecticut, sitting by designation.

Samuel Rosen, Milgrim Thomajan Jacobs & Lee, P.C., New York, NY, for Respondents.

Elliot Moore, Deputy Associate General Counsel, National Labor Relations Board, Washington, DC (Victoria A. Higman, Attorney, Rosemary M. Collyer, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, of counsel), for Petitioner.

PER CURIAM:

The NLRB seeks to enforce an order against Amateyus, Ltd., d/b/a Volk & Huxley, and Vulcan Typography Co. (together, "the Companies"), requiring them to cease and desist from unfair labor practices prohibited by the National Labor Relations Act Sec. 8(a)(1), (3), (5), 29 U.S.C. Sec. 158(a)(1), (3), (5), or from otherwise interfering with the exercise of their employees' rights under section 7 of that Act, 28 U.S.C. Sec. 157. Affirmatively, the order requires the Companies to recognize and bargain with New York Typographical Union No. 6 ("the Union"); to give retroactive effect to the collective bargaining agreement with the Union; to restore

wages and conditions to the status quo ante existing before Union recognition was withdrawn; to offer to reinstate and compensate employees; and to post appropriate notices. The Board's order is reported at 280 N.L.R.B. No. 21 (May 30, 1986). We affirm on the basis that there is ample support in the record for the NLRB's findings that Amateyus adopted its predecessor's collective bargaining agreement and that Vulcan Typography Co. ("Vulcan") was Amateyus' alter ego.

Amateyus bought Volk & Huxley, a typography and composition shop, from Imperial Ad Service Corporation in 1981. Volk & Huxley employees had been represented by the Union for almost thirty years, and Volk & Huxley,

as a member of the Printers' League Section of the Printing Industries of Metropolitan New York, Inc., was bound by the collective bargaining agreement between the League and the Union. After purchasing Volk & Huxley, Amateyus continued to operate the business in the same location, and it employed all the composing unit employees (the relevant bargaining unit) and two key salesmen, Ed Trager and Steve Hoffman, previously employed by Volk & Huxley. Furthermore, Amateyus followed the terms of the Union's collective bargaining agreement as regards hours, wages, holidays, and layoff procedures. Amateyus also checked off Union dues and employee vacation fund deductions, and remitted these sums to the Union.

After Amateyus became delinquent in October 1981 in remitting employer contributions to Union benefit and productivity, pension, and welfare funds, its president, John Cory, met with the Union business agent, Murray Irkowitz, and agreed to pay $5,000 weekly to become current. Amateyus later made two payments, of $5,000 and $5,100.54, to the Union's benefit and productivity fund. At about the same time, Cory sought from the Union some changes in the Union contract, submitting a written proposal to the Union president that in exchange for an increase in the number of Union employees, the Union should eliminate from the contract the productivity assessment, reduce the welfare assess-

ment by half, and change various work classifications. The Union did not agree to these contract modifications. On these facts, the NLRB found that Amateyus had adopted Volk & Huxley's Union contract, so that its later violation of the contract was an unfair labor practice.

In January 1982, a month after the Union had refused to modify the collective bargaining agreement, John Cory leased offices next door to Amateyus's offices, paying an $11,000 security deposit. Then John's 20-year-old college-student brother, Marc, incorporated Vulcan and set up a typography and composition shop in the premises John had leased. All Amateyus's equipment not subject to

lien was eventually moved over to Vulcan's shop. Marc also bought a substantial amount of new equipment for Vulcan, and there was evidence that John was largely instrumental in Marc's obtaining credit for these purchases. Marc, at John's suggestion, hired Amateyus's night foreman, John Sartori, as Vulcan's general manager. Sartori in turn recruited Amateyus employees for Vulcan. When offering a job to employee Robert Mariani, Sartori told him he should either "go with [Vulcan] or you're going to go down. You're better off going with them, because the Union can't get you any work."

At the very same time that Vulcan was setting up shop, Amateyus was

laying off bargaining unit employees and subcontracting work out. And when Vulcan opened, Amateyus's two key salesmen moved there, as did various other Amateyus employees, including an aunt of the Corys, who was the bookkeeper, and two family friends who occupied administrative positions. There was evidence that John Cory himself worked for and was paid by Vulcan at $1,000 per week for ten weeks. Vulcan operated a nonunion shop and paid rates below those fixed in Amateyus's collective bargaining agreement. Amateyus ceased operations altogether by laying off its two remaining employees in March 1982. On these facts, the NLRB held that Vulcan was the alter ego of Amateyus and was

therefore bound by Amateyus's collective bargaining agreement.

Amateyus argues that under NLRB v. Burns International Security Services, Inc., 406 U.S. 272, 294-95 (1972), it was required as a successor to Volk & Huxley to bargain with one incumbent Union over the initial terms or conditions of employment. Accordingly, it argues, that in at first following the contract terms it was merely attempting to maintain the status quo prior to negotiating with the Union and this cannot be said to be evidence that Amateyus had adopted the terms of Volk & Huxley's collective bargaining agreement. This position is inconsistent, however, with the interpretation of Burns by this court in

Nazareth Regional High School v. NLRB, 549 F.2d 873 (2d Cir. 1977), where it was held that an employer was bound to bargain before fixing the initial terms and conditions of employment only if "all of the employees ... have ... been promised re-employment on the existing terms." Id. at 881. There appears to have been no such express promise here, so under Burns with its Nazareth gloss, Amateyus would have been entitled to determine its initial employment terms without involving the Union.

The record indicates, however, that Amateyus did not bargain with the Union over the initial terms but instead chose to adhere to the terms of the Union's agreement with Volk & Huxley. On these facts, the NLRB was

perfectly entitled to find that Amateyus operated in accordance with the collective bargaining agreement and intended to adopt it. See Burns, 406 U.S. at 291; see also NLRB v. Babad, 785 F.2d 46, 49-50 (2d Cir.), cert. denied, 107 S. Ct. 114 (1986). Perhaps the strongest evidence of adoption is that John Cory in fact tried to negotiate certain modifications of the contract with the Union, even as Amateyus adhered to the terms of the contract and gave no indication that in any way it would not do so.

In determining whether Vulcan was the alter ego of Amateyus, the NLRB looked at the usual factors -- whether Vulcan had substantially the same business purpose, operations, equipment,

customers, management and supervision as Amateyus, see NLRB v. Campbell-Harris Electric, Inc., 719 F.2d 292, 295 (8th Cir. 1983); whether it was controlled by the old employer, see id. at 295-96; and whether it was incorporated in order to evade obligations to the Union, see Fugazy Continental Corp. v. NLRB, 725 F.2d 1416, 1419 (D.C. Cir. 1984). Substnatial evidence supports the NLRB's conclusion that Vulcan was Amateyus's alter ego and so was bound by Volk & Huxley's collective bargaining agreement. The evidence shows that in addition to the continuity of operations between the Companies and the retention of equipment, furniture and fixtures, there was a continuity

of personnel. John Cory continued to play a central role in Vulcan, being instrumental, for example, in obtaining financing for Vulcan's new equipment. Vulcan also retained Amateyus's two key salesmen, as well as other staff. The evidence showed too a lack of arm's-length dealing between the Companies (e.g., as regards the lease on Vulcan's premises, which Amateyus took out and for which it paid the security deposit), and an intent to avoid contract obligations (demonstrated, for example, by Sartori's statements that the Union was forcing Amateyus's closure, and that Vulcan would be nonunion).

Once it was established that Vulcan was bound by the agreement as

an alter ego of Amateyus, it is also clear that it violated the National Labor Relations Act: it repudiated the contract then in effect, changed terms and conditions, refused to recognize the Union, and subcontracted work without bargaining, in breach of section 8(a)(1) and (5), 29 U.S.C. Sec. 158(a)(1) and (5); and it unlawfully discriminated against union members by conditioning their employment on their abandoning Union membership, in breach of section 8(a)(1) and (3), 29 U.S.C. Sec. 158(a)(1) and (3). Amateyus violated the latter provisions when it laid off employees because of their Union membership and threatened plant closure because of their Union adherence.

This leaves us with Amateyus's and Vulcan's argument that the Administrative Law Judge ("ALJ") was biased. We do not think the argument frivolous -- for instance, we find offensive the ALJ's inexplicable and uncalled-for references to the two key salesmen as "the Marx Brothers," and the ALJ's premature and sarcastic incredulousness about Marc Cory's capacity to run the Vulcan business -- evidently he was a young-looking twenty -- was at the very least injudicious. But no formal motion and affidavit of bias was filled, as counsel belatedly admits was the proper procedure to follow under Board Rules and Regulations Sec. 102.37.

Perhaps the most difficult point

in the case involves the ALJ's challenge to Marc Cory's presence in the sequestered hearing room by saying to counsel, "[W]hat are you going to do, tell him he's President of Vulcan?," this before any employer's testimony had been taken, coupled with the ultimate determination not to credit John and Marc because that "[a]part from apparent inconsistencies in their testimony, ... their demeanor and action as witnesses would be sufficient to discredit them. At various times in their testimony both John and Marc [sic] were brash, arrogant, hostile and uncooperative." One can understand a certain amount of hostility and uncooperativeness, given the ALJ's prior remark. On the other hand, when

Marc Cory came into the hearing room it was counsel who said Marc was a representative of one of his clients and then that he was president of Vulcan. This was apparently the first time this had been suggested to the ALJ, so his surprise was understandable, though this does not justify, even if it does go to mitigate, the comment.

In the end, however, there were contradictions by the brothers of each other's testimony regarding John's work for and wages from Vulcan and his advice as to alterations of Vulcan premises, and the testimony of each was contradicted by external or third-party evidence. For example, Marc's professed lack of knowledge that a union represented Amateyus employees

was contradicted by evidence that he had worked at Amateyus while going to school and had discussed with Sartori the hiring of people and setting the terms and conditions of employment. In light of these contradictions, the ALJ's decision not to credit the Corys' testimony was justifiable.

Order enforced.

Appendix B-1

JD(NY)--75--85
New York, NY

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

AMATEYUS LTD., d/b/a VOLK & HUXLEY,
AND VULCAN TYPOGRAPHY CO.

and

NEW YORK TYPOGRAPHICAL UNION NO. 6

Leonard Grumbach, Esq., of
New York, NY, for the
General Counsel.
Samuel D. Rosen, Esq.
(Milgrim, Thomajan, Jacobs & Lee), of
New York, NY, for the
Respondent.
John J. Sheehan, Esq., of
New York, NY, for the
Charging Party.

Cases 2--CA--18630
2--CA--18649

DECISION

Statement of the Case

JULIUS COHN, Administrative Law Judge: This proceeding was tried at New York, New York during various dates in November 1982 and January and February 1983. Upon charges and amended charges filed by New York Typographical Union No. 6, herein called Union, in March of 1982, the Regional Director for Region 2 issued an Order Consolidating Cases and a Consolidated Complaint on 11 May 1982. Subsequently, the hearing was opened and a Motion to Amend the Complaint was granted. The Director then issued an Amended Consolidated Complaint dated 2 December 1982, alleging that Amateyus Ltd., d/b/a Volk & Huxley, and Vulcan

Typography Co., herein respectively called Amateyus and Vulcan, or Respondents, violated Sections 8(a)(1), (3) and (5) of the Act. Respondents filed an answer denying the commission of unfair labor practices. The Amended Consolidated Complaint raises issues as to whether Amateyus and Vulcan are alter egos; whether Respondents violated Section 8(a)(1) of the Act by urging employees to abandon the Union; whether Respondents additionally violated Sections 8(a)(1) and (3) of the Act by laying off employees; whether Respondents violated sections 8(a)(1) and (5) by repudiating their obligation to recognize and bargain with the Union, and additionally by subcontracting unit work without notice

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to the Union; and whether Amateyus violated Section 8(a)(5) by terminating its operations without affording the Union an opportunity to bargain as to the effects of such termination.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. General Counsel and Respondent submitted briefs which had been carefully considered. On the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent Amateyus Ltd., d/b/a

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Volk & Huxley, at all times material, was a New York corporation with a principal office and place of business at 228 East 45th Street, New York, New York.[1] Amateyus was engaged in printing and typesetting business at that location, and it is conceded that Amateyus derived gross revenues exceeding $50,000, and more than that amount was received both on the basis of direct outflow to States other than the State of New York, and also indirectly by shipments to other companies who in turn were engaged in interstate commerce.

---

1. There is indication in the record that a certificate of incorporation was never filed for Amateyus. However for the purposes involved herein, it will suffice that it is or was a de facto corporation.

Respondent Vulcan, a New York corporation with a principal office and place of business at 216 East 45th Street, New York, New York is also engaged in the business of printing and typesetting. It is also conceded by Respondents that Vulcan similarly derives revenues in excess of $50,000 as a result of direct providing of services to companies in States other than the State of New York and on an indirect basis, by providing services to companies who themselves are engaged in interstate commerce.

Accordingly I find, and as admitted by Respondents at the hearing that both Amateyus and Vulcan were or are employers engaged in commerce within the meaning of Section 2(2),

(6) and (7) of the Act.

Although not urged in its brief, Respondent argued at the hearing that the process was defective insofar as Vulcan was concerned as that corporation had not been served with a copy of the charges in this proceeding. However Vulcan was added as a co-Respondent in the Amended Consolidated Complaint which was received on Motion at the hearing. In addition to being named, there is no question that Vulcan was served with a copy of said Amended Consolidated Complaint and, moreover, had ample notice and time within which to prepare for the hearing. It has been held, particularly in situations such as are present in this case, where contentions are urged of alter

ego status of two corporate entities or joint employers, that failure to serve the original charge on one of the corporations is not fatal. Penntech Papers, Inc., 263 NLRB 284 (1982); Key Coal Company, 240 NLRB 1013 (1979). It is noted in the instant case General Counsel has alleged that Amateyus and Vulcan are alter egos. It is sufficient that Vulcan had notice of this allegation via the Amended Consolidated Complaint, and therefore had ample notice within which to defend that issue. The status of these corporations and the issue of alter ego will be more fully discussed, infra, in proper chronological order.

II. Labor Organization

The Union is a labor organization

within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Facts

Despite the length of the hearing, the salient facts are relatively brief and a substantial portion are basically uncontroverted. John Corigliano (also John Cory) was the president and sole stockholder of Amateyus. In mid-1981 Amateyus purchased all of the assets, including equipment, of Volk and Huxley, Inc., a division of Imperial Ad Service Corp., which had been engaged in advertising typography work. This company was owned and operated by a Mr. Frank Miller, who, as part of the sale held a lien against the equipment he sold to Amateyus, as well as the stock of Amateyus which

he agreed to hold in escrow until payment of the balance of the agreed purchase price. In addition to the physical assets, Cory, as part of the deal, was given the right to use the name of Volk & Huxley, which presumably was a name well known in the industry and considered a valuable asset.

It is undisputed that Amateyus took over and operated the business in the same location as Volk & Huxley, kept the employees employed in the composing room, continued the business of Volk & Huxley, including servicing of many of the same customers and, indeed, the two salesmen employed by Miller, Trager and Hoffman, whom Cory designated as his executive vice-presidents. Respondents conceded and

I find that Amateyus was a successor employer to Volk & Huxley.

Volk & Huxley had been for a number of years a member of the Printers League Section, of the Printing Industries of Metropolitan New York, Inc., and was therefore bound to the collective-bargaining agreement between the League and the Union which ran from October of 1975 through October 1985.[2]

---

2. The parties agree and I find appropriate the following collective-bargaining unit: All composing room employees in book and job offices covered by the collective-bargaining agreement between Printers League Section of Printing Industries of Metropolitan New York, Inc., and the Union to which Respondents' predecessor, Volk was a party. The unit is more fully described in Part I, Section 4 of said contract.

As noted Cory hired as executive vice-presidents, Trager and Hoffman, who also occupied those positions as well as being sales representatives for Miller. The two actually were sales partners and brought with them the customers who had given their work to Volk & Huxley, and loyally followed the sales representatives to Amateyus. In addition to these two officials, Cory hired a plant manager, Joe DeVita, and a family friend, Blake Ember as an administrative assistant, Kaika Clubwala, controller, and, finally, Marie Manley an aunt of the Corys', as a bookkeeper. Not only were the composing room employees retained by Amateyus, but it also applied the basic terms and conditions of em-

ployment as set forth in the Union contract. Wages, hours, holidays, lay off procedures were all maintained in accordance with the collective-bargaining agreement. Moreover Union dues were checked off by Amateyus as were employee deductions for a vacation fund and these sums were sent to the Union. The record further reveals that Amateyus made contributions to the annuity fund maintained by the Union under the contract.

Besides the annuity fund, employers under the collective-bargaining agreement were required to make contributions to the benefit and productivity fund, the pension fund, and welfare fund. In October of 1981, Murray Itkowitz, the Union business agent, met

several times with Cory in order to discuss the delinquency of Amateyus regarding payments to these latter three Union funds. According to Itkowitz, Cory finally agreed to pay $9,000 a week in order to clear up the arrears and also attempt to keep current with the funds. Cory actually delivered two checks to Itkowitz, one dated 30 October 1981 in the sum of $5,000 and the other dated 10 November 1981 in the amount of $5100, both payable to the Benefit and Productivity Fund. In his testimony concerning these meetings, Cory stated that he had not agreed nor did he pay any employer contributions to Union funds but rather only agreed to remit deductions from employees' pay. He

claims that the two checks referred to were drawn payable to the Benefit and Productivity Fund upon instructions from Itkowitz. I do not credit these statements by Cory. I find it incredible that a businessman such as Cory would pay over funds deducted from employees' wages to a Union Benefit and Productivity Fund to which payments were made only on the basis of employer, not employee, contributions. Moreover the record reveals that Union dues and credit union payments, all of which are deducted from employees' pay, were remitted, by Cory's own testimony, to the chapel chairman.

During the meetings at which Amateyus' arrearages in payments to the employer funds were discussed, Cory told Itkowitz that he was in need

of relief from these fund payments and, indeed, needed changes in the contract. As a result, and at Cory's request, Itkowitz arranged a meeting with Union president Bertram Powers. During November of 1981 such meeting took place at the Union office, and Cory continued his plea for relief from these payments. Powers replied that the Union was in the midst of negotiations with the employer association and that the subject of remedial changes with respect to the funds was being discussed during the bargaining. He asked Cory for a draft of what he personelly felt was his particular needs. Cory responded to this by letter dated 30 November 1981. Thereafter in December, Itkowitz saw Cory

and reported that the Union was not able to give him the changes he was looking for at the moment. He stated that Cory had to wait until the industry negotiations were completed and determine the outcome. Amateyus made no further payments to the employer funds after the two checks totaling approximately $10,000.

John Cory himself testified that his bookkeeper was able to pay social security and withholding taxes until approximately Thanksgiving or Christmas when the money ran out. He blamed his problems on the Union, and the obligations imposed upon him. In this connection Respondents contended that Amateyus was a union shop with union employees but denied having a

union contract. Cory further stated that during the last week of January, the employees began to conduct chapel meetings which actually were work stoppages, and though until that time he continued to hope he could operate profitably, he then concluded that the business was doomed.

A real estate broker testified without contradiction that in December of 1981 he had inquiries from Cory about leasing space, which he found at 216 East 45th Street. Alan Cohen, an officer of a real estate company which managed that building also testified that he dealt with John Cory about renting space and ultimately entered into a lease with him running from January 1, 1982 to December 31, 1991.

In this document the lessee was first indicated as Volk & Huxley, which name was crossed out and changed to Amateyus Ltd. and Imperial Ad Service Corp. John Corigliano (Cory) signed the lease as president of Amateyus and Imperial. Although Cory used the Imperial Name on the lease, he did not state why he did so but also said that he was not authorized to sign a lease as president of that company. In addition Cory stated that he had given $11,000 as security on this lease.

According to Itkowitz, employees had informed him in late December 1981 or early January, 1982 that some V & H (Amateyus) employees were doing work on the fifth floor at 216 East 45th Street. Thereafter he and another

Union agent, Grottola, visited the fifth floor at that building and saw some renovation work going on. They also observed two pieces of equipment one of which was in a crate and another was a camera used in a photo department of a typography business. The crate had a label on it which was addressed to Volk & Huxley at 228 East 45th Street.

A trucker, Gomez, testified that he delivered on 15 February 1982 a piece of equipment from Arkin Medo, a dealer, addressed to Volk & Huxley at 216 East 45th Street. His instruction was to deliver this to a person named "John Curley", apparently a reference to Cory. Again on 26 February he delivered a typesetter to

V & H at 216 East 45th. On this delivery his bill of lading had the address at 228 East 45th, but upon his arrival he spoke to Cory and was told to deliver the equipment to 216 East 45th. At the same time he picked up a cabinet at 228 and delivered it to 216 East 45th. This is confirmed by Itkowitz who testified that on this date he was at 228 and asked Gomez who had authorized the removal of this equipment and Gomez replied "Mr. Cory". Itkowitz said he followed Gomez and watched him load the equipment into the freight elevator at 216.

The chapel chairman, Siciliano, stated that during the week from 26 February through 1 March, Amateyus equipment, including machines and

other supplied, were removed from the premises at 228 East 45th Street. His testimony was based upon a record he kept of items being moved out. There was some slight disparity in the evidence concerning the removal of equipment. For example Miller stated he had information that equipment was being removed, and in March of 1982 he visited the 228 premises with an auctioneer. Miller, as previously noted, sold the premises and equipment to Cory and Amateyus, and had retained a lien on the equipment as security for the unpaid portion of the purchase price. After checking his list with the auctioneer, Miller claimed that certain items were not present, and thereafter he observed the equipment

in question at the 216 premises. An auction was conducted in April of whatever equipment was left by Amateyus at 228. In any case a dispute between Miller and Respondents concerning ownership of particular pieces of equipment need not be determined here, as it is sufficient for the purposes of this proceeding, and I find, there is no question that a certain amount of fixtures, equipment and suppliid had been removed from the 228 premises to the new location at 216.

The operation of Amateyus at 228 was gradually phased out, and on 26 February, a notice was posted discontinuing the lobster shift, and on 4 March, another notice that all em-

ployees would be laid off on 8 March except for two individuals. Then finally, a notice was also posted that these two would be laid off 15 March. Incidentally, the lay off notices were posted in accordance with the provisions of the collective-bargaining agreement as to time and notice required. Testimony was also received to the effect that various management people together with former employees of Amateyus removed more supplies during the last week at 228. According to John Cory he had gradually phased out his own association prior to the removal and claimed he had nothing to do with these activities. However the trucker, Gomez, testified that on 26 February, he delivered a machine

to 228 and was directed by Cory to take it to 216. In addition a plumber, Istrico, stated that about two weeks after 25 February he discussed his bill with Cory at 216. Moreover employees Daigneault and Hodges testified that at the end of February, they were instructed to give telephone callers for Cory, Trager or Hoffman the numbers at 216.

According to uncontradicted testimony of witness David Weinstein, President of a company known as Graphic Word, Amateyus had subcontracted certain work, usually "headline" work, but then, his company obtained new equipment in January 1982 enabling it to do text work. As a result in February 1982 Amateyus increased the

amount of work it subcontracted to Graphic. Thus for the period 26 February through 15 March, 1982, the dollar amount of work subcontracted was $7,032, representing a great increase over prior periods. There was no dispute that Amateyus had not notified the Union of this subcontracting of unit work.

While the events described above were transpiring, Vulcan Typography Co. came into existence. The details of its birth have been derived basically from the testimony of Mark Corigliano, (Cory), the brother of John. Mark was 20 years old at the time he testified in this proceeding. He had graduated from high school in April 1981 and from September 1981

through April 1982 he was a full-time student at college. He lived at home with his parents who paid part of his tuition. He resumed college in September of 1982 as a part-time student taking two courses three mornings a week. He had begun work at Amateyus with his brother John in the summer of 1981. The amount of time he was able to devote varied so that in some weeks he worked only five hours, but on some other days five hours. In the fall of 1981 he was a full-time sutdent and therefore averaged only 8 to 10 hours a week at Amateyus. He was paid $5 an hour either by cash or check and does not recall whether he was on the payroll or whether the usual payroll taxes were

deducted.

Mark further testified that he decided to form his own company in the latter part of January 1981, stating that at that time he did not know that Amateyus was going out-of-business. At around the same time he also had dinner with his brother who informed him that he did not believe it feasible for him, John, to continue in business. In his testimony, Mark at this point changed his story by stating that this assertion by John gave him the idea of going into business, and not as he had previously maintained that he had decided to go into business before having dinner with John

Mark then engaged a lawyer recommended by John. The attorney prepared

a certificate of incorporation for Vulcan, a name selected by Mark, but oddly the certificate of incorporation had the name of the incorporator as "John Corigliano". It appears that the name "John" was crossed out and "Mark" substituted. Mark then met with John again and told him he needed space. John replied that he had just signed a lease which was a bargain and he would give it to Mark at cost. John typed up a paper to the effect that Mark would take over the lease and sign it. There is no evidence that Mark reimbursed John for the $10,000 deposit he had paid to the landlord.

John also introduced him to John Sartori who had been the night foreman at Amateyus and then became Mark's

general manager. After coming to terms with Sartori he gave him permission to hire additional people for the shop. He also left it to Sartori to determine the number and type of employees to be hired, since he himself did not know how many would be necessary. Indeed Sartori had begun as early as 19 January 1982 to recruit employees as several of them testified without contradiction. Thus Robert Mariani stated that he received a telephone call on that date from Sartori who told him that things were pretty bad and the bosses were closing down the shop and opening up a nonunion shop next door. When Mariani asked what he could do about it, Sartori replied that he could "either go with

them or you're going to go down. You're better off going with them, because the Union can't get you any work." Similarly Sartori met an employee named Douglas Daigneault, a serviceman, at a restaurant one day after work. He told Daigneault that a new shop was going to be opened and they would like him to go along and that it was going to be nonunion. Sartori also said that this was to be a big operation and he gave him some literature relating to wage rates and other conditions with respect to a hypothetical company. A couple of days later Daigneault informed DeVito, who had previously told him he was going over to the new company, that he was not going to join the new place.

Additionally George Hodges, also a serviceman, stated that he received a telephone call at home from Sartori on 9 February 1982 and was asked what he was going to do when the new operation came into effect. Hodges told Sartori that he would not go nonunion. Another employee, Kenneth Willison, testified that Sartori spoke to him in the shop on 25 February and informed him the company was going to open a nonunion shop next door and asked if he wanted to go. Willison at that time said he was not sure, and on the following day Sartori gave him some literature to read concerning pay and benefits. Sartori actually told him to report on 1 March to the next building. On 27 February Willison and

three other employees met with Sartori and discussed the arrangements for the removal of some equipment. Willison actually went to work at the new premises but quit after four days.

As to the Vulcan operation, Mark Cory testified that he was the sole stockholder, director, and officer of that entity and it commenced business on 1 March 1982. By that time Amateyus had laid off most of its employees and was gradually phased out within the next week or two. Mark stated that he started with capital of approximately $70,000, of which $60,000 was given him by his parents, and $10,000 advanced to him by a friend who had been promised to be repaid with interest. Mark also said that he paid rent to the agent of

the building, Berley & Co. He claimed there was some paper prepared by John assigning the lease to him but he lost it. Mark didn't recall that the paper said anything about payment of the security to John who had deposited it. Moreover Mark reported that he does not receive any salary from Vulcan but takes his money in the form of dividends, except there had not been any. He stated he had no living expenses since he lived at home, at there and was supported by his parents. On the other hand, train fares and dining expenses came out of Vulcan which also provided him with credit cards. Vulcan was unable to furnish payroll records for any period preceding 13 April. According to Mark, "it was a

little hectic for the first few weeks." At another stage of his testimony, Mark averred that Automatic Data Processing Company had prepared the payroll from the beginning of the second week.

Besides Mark, the management people of Vulcan were those who transferred from Amateyus and performed the same functions at Vulcan. They were Sartori as already noted, DeVita, Clubwala, and Marie Manley (the aunt of the Corys'). Perhaps most important were Trager and Hoffman, the salesmen partners, who had been also officials of Amateyus and who brought with them their list of customers. The role of John Cory is not quite as clear. Mark testified that John was working about 50 hours during the first week of

Vulcan's operation. He states that John's workweek tapered off to about 35 hours thereafter and then after six weeks it was practically nothing. Mark further stated that thereafter John would stop in occasionally and use the phones and do some of his own work out of the Vulcan office. John would also occasionally fill in and help on the computer, or sit with him and offer him help or advice. Mark told the employees to listen to John and follow his instructions as if they came from him. However payroll records indicate a slightly different tenure. These records were furnished for the period commencing with the payroll ending 13 April, Mark having testified that he did not know where the payroll

records are for the period preceding that week. The payroll records indicate that John was on the payroll for ten weeks beginning the week ending 13 April 1982 and ending 13 June 1982. The records further show that for these weeks checks payable to John Cory were issued, each in the sum of $1,000, from which a payroll tax deduction of $67 was made. In his testimony John Cory said that he was not paid for services to Vulcan except for some expenses for small items. The checks themselves, either cancelled or otherwise, were not produced. However cash disbursement sheets of Vulcan indicate that at least two of them were returned or marked void which had been made to John Corigliano Jr. Two

others in the same amount, that is $1,000 less $67 for security taxes, were made out and apparently cashed or deposited by John Corgliano Sr. There were two other entries on the same disbursement sheet, other than payroll checks, which involved two checks made payable to an Aratusa Ltd., in the sum of $3500 and $7500, respectively. This company was a John Corigliano Jr. enterprise against which the State of New Jersey had a judgment, (also against John personally), in the amount of $51, 250. Although another witness, Jerry Corigliano, a cousin of Mark and John, and employed by Vulcan as a part-time bookkeeper, testified that the checks drawn to John Corigliano Sr., were in payment

of a loan made by him, I do not credit this testimony. Checks drawn in payment of a loan do not ordinarily contain deductions for social security taxes.

The employees who commenced the operation at Vulcan were those recruited by Sartori. Indeed Mark testified that he permitted Sartori to make all the arrangements including fixing of job assignments, pay rates and hours. He did present Sartori with a system of personnel rules and policies which were contained in the papers given by Sartori to the employees whom he solicited. This of course changed the conditions and rates which existed at Amateyus. Thus the employees were on a 40 hour week, the wages were less, and the employees were placed in a

single classification rather than specialty classes.

It appears from the record that equipment used at Vulcan was a mixed bag. Some equipment having belonged to Amateyus was moved over directly to Vulcan. Other equipment of Amateyus on which Miller had a lien had been auctioned off by him in part payment of the money due from Amateyus as a result of the original sale. Still other pieces of equipment which John Cory and Amateyus had on lease from leasing companies apparently were transferred over to Vulcan on the same terms. Some new machines were ordered by Mark, according to him, and leased from one of the equipment leasing companies after introductions he claims

to have received from John. The value of this leased equipment and the money due on them was undoubtedly a considerable sum.

As for sales by Vulcan, Willison, the employee who transferred over and left after four days, testified that the customers seemed to be the same as those sold by Amateyus. In this regard Mark acknowledged that the accounts of Trager and Hoffman constituted the whole of h.s business. Introduced into the record was a copy of an advertisement placed in a trade journal seeking salesmen as well as typesetters. Among other things the advertisement noted that the business was "free of union restraints." The ad concluded with a request that people responding should

call Mr. Cory at a certain telephone number.

In its Answer, Respondents assert that the Charging Party (Union) has engaged in such flagrant conduct that precludes any relief being granted to it. The only testimony in support of this contention is in the testimony of John Cory. Basically this consists of his statements that during the month January 1982 and thereafter materials such as fonts were mislaid or disappeared, that manuscripts and documents were stolen or los, that obscene phone calls were received, and the like. In addition, the Union wrote letters to customers, informing them that employees had been locked out, that

the company owed money to the funds, that Cory owed taxes to New Jersey and the Federal government, that the management of Vulcan could not produce work at the standard of Volk & Huxley, and requested that customers not do business with Vulcan.

As to the "dirty tricks" allegations, it is noted that there is no evidence of any specific employees or agents of the Union, as perpetrators of such conduct.

B. Analysis and Conclusions

1. Credibility Resolution

Based upon the record as a whole, I do not credit the testimony of the Corigliano brothers, both John and Mark. Their basic story of the formation of Vulcan by Mark is com-

pletely beyond belief. The whole scheme of a young man, barely 20 years of age, without financial resources of his own, starting up a business of some technical difficulty, without significant prior experience in that trade, is pure fantasy. Apart from apparent inconsistencies in their testimony, some of which will be later pointed out, their demeanor and actions as witnesses would be sufficient to discredit them. At various times in their testimony both John and Mark were brash, arrogant, hostile, and uncooperative. The latter manifested itself in their frequent refusal, sometimes on advice of counsel, to answer, in this civil proceeding, questions relevant to the business of

either Amatevus or Vulcan, or in regard to relationships with other management people or, in John's case, to the Union.

Their testimony was contradictory of one another in several regards. Principally, John statet that he did not work for Vulcan. On the other hand Mark testified that not only did John advise him concerning alterations to the premises at 216 as well as other matters, he also said that John actually worked a substantial number of hours at Vulcan when it began its business. By the same token John stated that he had not received any wages from Vulcan, and yet the record reveals that there were ten paychecks made out to his order. Since Vulcan did not produce payroll records for approxi-

mately the first six weeks of its business, there is a strong possibility that John also received payments for this additional period, as Mark testified that John worked at the outset of Vulcan's existence.

In further contradiction of John's testimony that he had nothing to do with the initial alterations to the Vulcan premises, Mark testified that he received advice from him about this, and the plumber also testified that John Cory spoke to him in connection with that aspect of the work. Prior to these events John denied that in his operation of Amateyus he made payments to the Union's Annuity Fund as set forth in the contract. Union records intro-

duced into evidence indicate that such payments had been made. Incredibly he also stated that Amateyus made no payments to the Union's Benefit and Productivity Fund. However he signed two checks payable specifically to those funds but testified these checks were actually a transfer of deductions made from employees' pay for other reasons. If this story were true it would appear that using employees' personal deductions for payments to the Union's Benefit and Productivity Funds would indeed be a misappropriation of those funds.

As an example of John's arrogance and apparent disregard not only for truth but also revealing of his deceptiveness, John admitted signing

the lease at 216 as president of Imperial Ad Service Corp. (Miller's Corporation), while conceding that he was not entitled to do so.

Finally as to John, I find it completely unbelievable that he effectively left Amateyus about 16 February 1982, that he no longer knew what became of its bank account, accounts receivable or any other financial arrangements of Amateyus, despite the fact that it apparently continued doing business for almost another month. Moreover, John Cory contended that he left all of the books and records at Amateyus' premises and doesn't know what happened to them, nor did he know who paid the payroll and other expenses

after that date.

As to Mark, I already pointed out the inherent implausibility of his situation as an entrepreneur engaging in this type of business operation. Specific instances of his lack of credibility are reflected by his attempts to explain the checks made payable to John. But apart from credibility, his testimony on that subject should not be considered because of his failure to produce more than one page of the Vulcan cashbook subpoenaed by General Counsel. In another vein, although Mark testified that he discussed with Sartori the hiring of people and the setting of terms and conditions of their employment, he

denied having any knowledge that a union represented the Amateyus employees whom they were about to hire at Vulcan. This is patently incredible in view of the fact that Mark had also stated that he had worked at Amateyus, while attending school, where all the employees, including Sartori himself, were members of the Union.

For all of the reasons set forth above, I find as previously noted that the testimony of John and Mark Cory is incredible and should not be believed when it conflicts with testimony or other evidence produced by General Counsel.

2. The Alter Ego Issue

A principal threshold issue is whether Amateyus and Vulcan con-

stitute alter egos. In Crawford Door Sales Co., Inc., 226 NLRB 1144 (1976), the Board noted that it generally has found alter ego status "where the two enterprises have 'substantially identical' management, business purpose, operation, equipment, customers and supervision, as well as ownership." In the instant case these criteria are met on the basis of the facts set forth above. In effect, the operation of Amateyus was moved merely from one building to an adjacent building on the same street. Much of Amateyus' supplies and equipment was moved to the Vulcan location with the exception of those machines and items subject to the lien of the predecessor of Amateyus (Miller), and was sold by him

at auction. Other pieces of equipment which were leased by Amateyus were transferred to Vulcan, who continued to lease it from the same lessor. In addition new equipment was purchased or leased by Vulcan with the assistance of John Cory. With regard to management, Sartori and DeVita who were in charge of production at Amateyus continued in the same function at Vulcan along with employees who consented to come to the new operation on a nonunion basis. The customers were the same and actually were controlled by Trager and Hoffman, the two salesmen at Amateyus who came over in the same capacity at Vulcan. Actually Mark Cory testified that without these two individuals, he

would have no business. Basically the only difference then is one of a different corporation and the surface substitution of Mark Cory for John Cory as owner. It is clear on the basis of the facts recited above that this change was only cosmetic and actually the only change that is readily apparent was that of the name of the company and a shuffling of ownership interest in the same family.

Finally John Cory had stated that in view of the financial obligations resulting from adherence to the terms and conditions of employment set forth in the contract with the Union, he believed that his business, Amateyus, was doomed. Immediately following this realization,

he set in motion the move to the next building, the only change being the formation of a new corporation with his young brother Mark as the ostensible owner. Noted also is the recruitment of Amateyus employees on condition that they work on a nonunion basis. Clearly this change was only for the purposes of avoidance of the Union and the contract. I find in all the circumstances that Vulcan is the alter ego of Amateyus.[3]

3. The Successorship Issue

In NLRB v. William J. Burns

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3. All Kind Quilting, Inc. 266 NLRB, 1186 (1983); Fugazy Continental Corp., 265 NLRB 1301 (1982).

International Securities Services, Inc., 406 U.S. 272 (1972), the Supreme Court affirmed the Board's successor-employer doctrine, finding that a successor-employer, absent a reasonably based good-faith doubt of the incumbent's union majority, is obligated to recognize the continuing representative status of the bargaining agent of its predecessor's employees in an appropriate unit taken over from the predecessor. This is conceded in this case as Respondent's counsel stipulated at the hearing that Amateyus was a "Burns successor". Counsel went further and said that to all intents and purposes Amateyus operated a union shop but that there was no contractual relationship with

the Union.

General Counsel contents that in the circumstances of this case Amateyus and its alter ego, Vulcan, not only had an obligation to recognize the Union but also to honor the existing contract which the Union had with its predecessor. In Pine Valley Division of Ethan Allan, Inc., 218 NLRB 208 (1975), enfd. in part 544 F.2d 742 (4th Cir. 1976), the Court enforced a Board order finding that there had been an adoption by the successor of the contract, of its benefits and obligations. In that as in the instant case of Amateyus, there was continuity in the operation, which was conducted with the same job, employees and working conditions. In

addition Union dues were deducted and remitted to the Union through a recognized chapel chairman (Steward). Moreover Amateyus did make at least two substantial payments to the Union's Benefit and Productivity Fund, though concededly it was delinquent in that regard. While it is true that John Cory at various points did complain to Union officials concerning what he believed to be onerous provisions of the contract, particularly the welfare and pension plans, he did not indicate that he would not abide by the terms of the contract.

The Board has found an adoption or assumption where a successor-employer has not only applied provisions of the contract but has also

consulted and negotiated with the existing union.[4] Moreover the Board found a successor bound by the contract when it applied its provisions, including union dues deductions, and health and welfare contributions.[5] I find, therefore, by virtue of the actions of Amateyus from the time it succeeded Miller and/or Imperial Ad Service Corp., until it closed down at 228 East 45th Street, that it did indeed assume the obligations of its predecessor's contract.

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4. World Evangelism, Inc., 248 NLRB 909 (1980), enfd. 656 F.2d 1349 (9th Cir. 1981); Stockton Door Co., Inc., 218 NLRB 1053 (1975); Eklund's Sweden House Inn, Inc., 203 NLRB 413 (1973).
5. Virginia Sportswear, Inc., 226 NLRB 1296 (1976).

Having found that Vulcan is the alter ego of Ameteyus by virtue of what may be described as a sham transaction, Vulcan then continues to be "subject to all the legal and contractual obligations of the predecessor."[6] Moreover it is equally clear that Amateyus phased out its business and thereafter continued it under the name of Vulcan at the new location, after having induced employees of Amateyus, as well as supervisors and management some of whom were also members of the Union, to become employees at Vulcan on a nonunion basis and on wages, hours and other conditions of employment dissimilar from

6. Howard Johnson Co., Inc., v. Detroit Joint Executive Board, Hotel Employees, 417 U.S. 249, 259 (1974).

those embodied in Union contract. By this conduct, Respondents Amateyus and Vulcan violated Sections 8(a)(1), (3) and (5) of the Act. It is well settled that an employer cannot discontinue its business, even for economic reasons, if it immediately begins conducting that business while evading its obligations under a union contract.[7]

Accordingly by laying off their employees in March of 1982 because of their membership in the Union, Respondents violated Sections 8(a)(1)

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7. Artcraft Ornamental Iron Co., Inc., and Rich-Moro Insurance Agency, Inc., 271 NLRB No. 133 (1984).

and (3) of the Act. Similarly by threatening the employees with loss of jobs and conditioning their employment at the Vulcan operation, in March 1982, on abandonment of their membership in the Union, Respondents further violated these sections of the Act. Trior Products, Inc., 239 NLRB 65 (1978); Redlands Construction Co., 265 NLRB 586 (1982).

4. Other Alleged Violations of Sections 8(a)(1) and (5) of the Act

It is alleged that during the period from approximately mid-February through the time of the closedown of the Amateyus operation in March of 1982, Respondents unlawfully subcontracted unit work. David Weinstein,

president of Graphic Word, testified that for number of years he had performed work on a subcontract basis from Amateyus and its predecessor Volk & Huxley. The amount of this work was relatively small. Thus his records reveal that from 1 February until the 25th of the month, he did only $25 worth of business. However from the last week of February through 25 March, invoices of Graphic to Amateyus totaled over $7,000. It is this sudden increase in the quantity of unit work, which General Counsel contends constituted unlawful subcontracting without notice to the Union, in violation of Section 8(a)(5).

Of course this precipitous increase in the rate of subcontracting

occurred during February through mid-March when Amateyus was laying off employees in preparation for its shutdown and the commencement of operations at Vulcan.

In Otis Elevator Company, 269 NLRB 891 (1984), the Board redefined its view toward subcontracting in light of the rationale explicated by the Supreme Court with regard to plant closure in First National Maintenance v. NLRB, 452 U.S. 666 (1981). The Supreme Court emphasized "management's need for predictability, speed, secrecy and to operate profitably." Thus the Court determined that the legality of an employer's decision to subcontract turned upon a reduction of labor

costs, not change in operation. The Board, in Otis, stated that an employer's decision "to discontinue its own distribution operation and to contract out that function turned upon a fundamental change in the scope and direction of the enterprise," and would not be subject to Section 8(d) of the Act. However, the Board emphasized that this result would obtain only if "no alter ego or other sham devices were employed to disguise a unilateral reduction in labor costs in an operation over which the employer maintained surreptitious control."

This proviso covers precisely the situation in the instant case. Respondent did organize an alter ego, terminated employees because of their

union membership, and commenced a new operation primarily to reduce labor costs. Accordingly I find that the substantial increase in subcontracting, in the midst of this unlawful activity, violated Sections 8(a)(1) & (5) of the Act.

The Amended Complaint alleges that Respondents violated Section 8 (a)(5) by implementing and enforcing new work rules for unit employees. The evidence is uncontradicted that Vulcan, at the new premises, instituted new wage rates and hours, changed work classifications, and implemented new work rules as embodied in the model distributed by Sartori to the employees who came over from Amateyus. By this conduct, without

notice or bargaining with the Union, Respondents further violated Section 8(a)(5) of the Act.

It is additionally alleged that Respondents violated Section 8(a)(1) and (5) by the action of Amateyus in terminating its business without notifying and offering the Union an opportunity to bargain concerning the effects of such termination. This finding may not be necessary in view of my conclusion that Amateyus and Vulcan are alter egos and violated Sections 8(a)(1), (3) and (5) by its conduct discussed above. However, in the event that such determination not be upheld, it is clear that Respondent Amateyus would have violated Section 8(a)(1) and (5) by failing to give

the Union an opportunity to bargain as to the effects of its decision to terminate.

Union representative Itkowitz testified that the Union had not received any notice from Amateyus as to the closing, and of course, no offer to bargain about the effects of that decision. It is now well established that "the union must be given a significant opportunity to bargain" as to the effects of an employer's decision to terminate its business. First National Maintenance Corporation, 452 U.S. 666 (1980). By Respondent Amateyus' failure to do so, it further violated Sections 8(a)(1) and (5) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in Section III, above, occurring in connection with the operations of Respondent described in Section I above, have a close, intimate, and substantial relationship, to trade, traffic and commerce among the several states and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of

the Act.

Having found that Respondent Amateyus as a successor-employer, violated Section 8(a)(5) of the Act, by failing and refusing to bargain with the Union as the collective-bargaining representative of the employees in the unit found appropriate herein, and moreover having unlawfully withdrawn recognition of the Union, I recommend that Respondent Amateyus, and its alter ego, Respondent Vulcan, be ordered to recognize and bargain in good-faith with the Union.

I have additionally found that by conduct during approximately June 1981 through March 1982, Respondent Amateyus adopted the collective-

bargaining agreement between the Union and Volk & Huxley, which it then repudiated by its withdrawal of recognition, termination of its operations as Amateyus, and unlawful layoff of its employees. At the same time Respondent Vulcan commenced its operations, as alter ego, at an adjacent building. Accordingly I shall recommend that Respondents Amateyus and Vulcan make whole all employees in the unit found appropriate herein, from the dates of their terminations until the present, for all losses of wages and benefits that they and the Union sustained as a result of the repudiation of the contract. Moreover, as Respondent Vulcan unlawfully made substantial changes in wage rates

and other conditions of employment, I further recommend that it be required to restore the status quo ante as existed prior to the changes if the employees so desire.

Having found that Respondent Amateyus discharged the employees listed on Appendix A annexed hereto, in violation of Sections 8(a)(1) and (3) of the Act, I recommend that Respondent Amateyus and/or its alter ego Respondent Vulcan be ordered to offer them reinstatement and to make them whole for any loss of earnings and other benefits resulting from their discharge. The amount of back-pay shall be computed in the manner set forth in F.W. Woolworth Co., 90 NLRB 289 (1959), with interest

thereon to be computed in the manner prescribed in Florida Steel Corp., 231 NLRB 651 (1977).[8]

Finally having further found that Respondent Amateyus violated Sections 8(a)(1) and (5) by terminating its operation without affording the Union an opportunity to bargain concerning the effects of such closedown, I would recommend alternatively, that in the event Vulcan is not found to be the alter ego of Amateyus, then Amateyus shall be ordered to bargain with the Union concerning the effects on its employees of the termination of its operations in March 1982.

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8. See generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

Because of the egregious nature of the violations herein, including the termination of almost all of the Amateyus employees, I shall recommend the entry of a broad Order.[9]

Conclusions of Law

1. Respondents Amateyus and Vulcan are employers engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the collective-bargaining representative of the employees in the following unit found appropriate herein:

9. See Hickmott Foods, Inc., 242 NLRB 1357 (1979).

> All composing room employees in book and job offices covered by the collective-bargaining agreement between Printers League Section of Printing Industries of Metropolitan New York, Inc., and the Union to which Respondents' predecessor, Volk & Huxley was a party. The unit is more fully described in Part I, Section 4 of said Contract.

4. Amateyus is the successor-employer to Volk & Huxley.

5. Vulcan is the alter ego of Amateyus.

6. By its conduct as successor of Volk & Huxley, Amateyus adopted the collective-bargaining agreement.

7. Respondents violated Sections

8(a)(5) and (1) of the Act by refusing to honor the collective-bargaining agreement then in effect.

8. Respondents violated Sections 8(a)(1) and (3) by discharging the employees of Amateyus named in "Appendix A" because of their membership in support of the Union.

9. Respondents further violated Section 8(a)(5) of the Act by increasing the subcontracting of unit work without notice to the Union; and by changing wage rates and other terms and conditions of employment.

10. Respondents violated Section 8(a)(1) of the Act by threatening to close the Amateyus operation and to discharge employees if they continued their membership and support for the

Union; and additionally by conditioning further employment upon abandonment of their membership in the Union.

11. Alternatively, in the event it is found that Respondents are not alter egos, then Respondent Amateyus violated Sections 8(a)(5) and (1) of the Act by terminating its operations without affording the Union an opportunity to bargain about the effects of such closing upon the employees.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[10]

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10. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of

ORDER

Respondents Amateyus and Vulcan, their agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with respect to wages, hours, and other terms and conditions of employment with New York Typographical Union No. 6, as the exclusive bargaining representative of the employees in the unit described above as appropriate herein.

(b) Refusing to honor and abide by the contract between their predecessor Volk & Huxley and the Union for

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the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

the period from 1 March 1982.

(c) Laying off, discharging, and refusing to recall employees because of their membership in or support for the Union.

(d) Subcontracting unit work without notice to the Union.

(e) Changing wage rates and other terms and conditions of employment without notice to the Union.

(e) Changing wage rates and other terms and conditions of employment without notice to the Union.

(f) Threatening employees with plant closure and loss of jobs; and conditioning further employment upon abandonment of their membership and support for the Union.

(g) In any other manner re-

straining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain in good-faith with New York Typographical Union No. 6 as the exclusive bargaining representative of all employees in the appropriate unit set forth above.

(b) Honor and give retroactive effect from 1 March 1982, to the terms and conditions of the collective-bargaining contract with the Union, including payment of wages and benefits as prescribed.

(c) Restore the status quo ante with respect to changed waged rates

and other unilateral changes made subsequent to the withdrawal of recognition after 1 March 1982.

(d) Offer the employees named in "Appendix A" immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this Decision.

(e) Preserve and on request, make available to the Board or its agents for examination and copying, all pay-

roll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post ast its facility in New York, New York, copies of the attached notice marked "Appendix B".[11]

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11. If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

IT IS FURTHER ORDERED that the

complaint be dismissed as to any allegations of the complaint not specifically found.

Dated, Washington, D.C. 27 June 1985

Julius Cohn
Administrative Law Judge

2 CA 18630
2 CA 3649

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT
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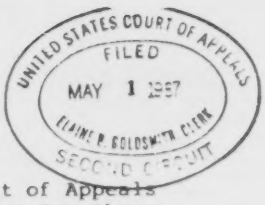

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of May one thousand nine hundred and eighty-seven.

Present: HON. JAMES L. OAKES,

HON. RALPH K. WINTER, Circuit Judges,

HON. ROBERT C. ZAMPANO, District Judge.*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

-v.- No. 86-4149

AMATEYUS, LTD., d/b/a VOLK & HUXLEY and
VULCAN TYPOGRAPHY CO.,
Respondents.

An application for an enforcement of an order of the National Labor Relations Board

This cause came on to be heard on a certified list of items comprising the record of the National Labor Relations Board and argued by counsel,

Upon consideration thereof, it is hereby ORDERED, adjudged and decreed that the application for enforcement of said order be and it hereby is granted and the order enforced in accordance with the opinion of this court with costs to be taxed against the respondents.

Elaine B. Goldsmith,
Clerk

By: Edward J. Guardaro,
Deputy Clerk

* Of the District of Connecticut, sitting by designation.

280 NLRB No. 21

D--3781
New York, NY

69917

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMATEYUS, LTD., d/b/a VOLK & HUXLEY,
AND VULCAN TYPOGRAPHY CO.[1]

and

Cases 2--CA--18630
2--CA--18649

NEW YORK TYPOGRAPHICAL UNION NO. 6

DECISION AND ORDER

On 27 June 1985 Administrative Law Judge Julius Cohn issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and a brief in support of the decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, and to adopt the recommended Order

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[1] As set forth in the 11 May 1982 order consolidating cases and consolidated complaint, the Respondents were styled as "Volk and Huxley, Inc.; and Vulcan Typography Co." Subsequently, the 2 December 1982 amended consolidated complaint styled the Respondents as "Amateyus, Ltd. d/b/a Volk & Huxley, and Vulcan Typography Co."

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We further find no merit in the Respondents' contentions that the judge's conduct of, and demeanor at, the hearing manifested bias. Having carefully and fully considered the record and the judge's decision, we find no evidence that he prejudged the case, made prejudicial rulings, or

(Footnote continued)

BEST AVAILABLE COPY

as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Amateyus, Ltd., d/b/a Volk & Huxley, and Vulcan Typography Co., New York, New York, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(d).

"(d) Offer Ed Appel, Jack Bober, Charles Buchholtz, Bob Clare, Gene Croce, Charles Cusack, Douglas Daigneult, Richard Hannon, Irwin Harris, John Herr, George Hodges, Paul Hulburt, Harold Krakora, Robert Mariani, James McLellan, Anthony Melodia, Mike Romano, Peter Reithinger, Fred Serricchio, Robert Siciliano, Ken Silvey, Charles Strazza, Ken Willison, and Charles Zanelotti immediate and full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earning suffered as a result of their discharge."

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demonstrated a bias against the Respondents in his analysis or discussion of the evidence. We also find no basis for Respondents' contention that he demonstrated disrespect for the Federal courts.

We also note that the Respondents conceded at the hearing that Amateyus was the successor to Volk and Huxley and that there were no exceptions to this finding.

The judge stated that Mark Cory decided in January 1981 to go into business. The correct year is 1982.

3 We are modifying the recommended Order to omit employee Milton Tessenholtz from those employees found to be discriminatees. While the complaint included Tessenholtz as an alleged discriminatee, the record establishes that Tessenholtz' employment terminated in mid-1981---long before the March 1982 terminations here.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. 30 May 1986

Donald L. Dotson, Chairman

Patricia Diaz Dennis, Member

Wilford W. Johansen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD